

1 IN THE UNITED STATES COURT OF FEDERAL CLAIMS

2

3

4 ROGER BIRDBEAR, et al., )

5 Plaintiffs, )

6 vs. ) Case No.

7 THE UNITED STATES OF AMERICA, ) 16-75L

8 Defendant. )

9

10

11

12 Suite 705

13 Howard T. Markey National Courts Building

14 717 Madison Place, N.W.

15 Washington, D.C.

16 Wednesday, November 2, 2016

17 2:00 p.m.

18

19

20 BEFORE: THE HONORABLE ELAINE D. KAPLAN

21

22

23

24

25 Transcribed by: George Quade, CERT

Roger Birdbear, et al. v. USA

11/2/2016

1 APPEARANCES:

2 ON BEHALF OF THE PLAINTIFFS:

3 DAVID C. SMITH, ESQ.

4 DUSTIN T. GREENE, ESQ.

5 Kilpatrick, Townsend & Stockton, LLP

6 607 14th Street, NW

7 Suite 900

8 Washington, D.C. 20005

9 (202) 508-5865 / (202) 585-0052 (fax)

10 dcsmith@kilpatricktownsend.com

11

12

13 ON BEHALF OF THE DEFENDANT:

14 JODY SCHWARZ, ESQ.

15 LAURA DUNCAN, ESQ.

16 U.S. Department of Justice - ENRD

17 601 D Street, NW

18 Post Office Box 663

19 Washington, DC 20044-0663

20 (202) 305-0245 / (202) 353-2021 (fax)

21 jody.schwarz@usdoj.gov

22

23 ALSO PRESENT:

24 Holly Clement, Esq., Department of Interior

25

Roger Birdbear, et al. v. USA

11/2/2016

1 P R O C E E D I N G S

2 - - - - -

3 (Proceedings called to order at 2:01 a.m.)

4 THE COURT: This is Birdbear vs. the United  
5 States, Case Number 16-75. Would counsel for the  
6 Plaintiff please identify himself for the record?

7 MR. SMITH: Yes, Judge Kaplan. This is David  
8 Smith, and also on the phone is Dustin Greene who works  
9 with me.

10 THE COURT: Okay. And for the Government?

11 MS. SCHWARZ: Yes. Good afternoon, Your Honor.  
12 This is Jody Schwarz with the Department of Justice.  
13 Also on the phone with me is Laura Duncan. She is an  
14 attorney at the Department of Justice. And Holly  
15 Clement, she is an attorney at the Solicitor's Office.

16 THE COURT: Okay. Okay. Well, I decided to  
17 hold this status conference, I just wanted to check in  
18 with the parties on where things stand. And my  
19 understanding is that you've been trying to work amongst  
20 yourselves to try to see if you could figure out which  
21 parcels of land the Plaintiffs had an interest in, and I  
22 assume there are other documents that the Plaintiffs had  
23 requested from the Government.

24 And, so, I wanted to see what the status of  
25 those efforts were. I know that the Plaintiff was

Roger Birdbear, et al. v. USA

11/2/2016

1 supposed to file an amended complaint, if possible, on  
2 November 7th. So where are we with that, Mr. Smith?

3 MR. SMITH: Yes. The -- I just got them,  
4 though. The idea would be that we would get a rolling  
5 production of the documents, and these are documents that  
6 we had requested under some FOIA requests prior to  
7 litigation and informally and didn't get. And Jody  
8 contacted us last week and there were some difficulties  
9 in producing the documents, and we understand that.

10 And she indicated that they could be produced  
11 early this week subject to a protective order. Again, we  
12 understand that. We're doing the protective order now.  
13 There are some third-party information in those documents  
14 apparently that required a protective order. We're  
15 agreeable to that.

16 So once that is worked out, she's indicated the  
17 documents can be produced. I understand that there's  
18 about roughly 5,000 pages of documents in that  
19 production. We obviously don't know what's in there yet.  
20 My guess is it would be difficult with a late production  
21 to amend a complaint (inaudible).

22 THE COURT: Right.

23 MR. SMITH: (Inaudible).

24 THE COURT: Now -- yeah. So -- but these  
25 documents, are these documents that are going to provide

Roger Birdbear, et al. v. USA

11/2/2016

1 you with the information that you need about which  
2 parcels of land the Plaintiffs have an ownership interest  
3 in?

4 MR. SMITH: That's what I am told. And maybe  
5 Jody can fill us in, but, yeah, that's what she has  
6 indicated to us.

7 THE COURT: Okay. Ms. Schwarz?

8 MS. SCHWARZ: Yes, Your Honor, that is correct.  
9 The documents that are going to be produced are the title  
10 and status reports, which will show which tracts  
11 Plaintiff has an interest in.

12 THE COURT: Okay.

13 MS. SCHWARZ: And then also the associated  
14 leases and agreements with those tracts.

15 THE COURT: Okay.

16 MS. SCHWARZ; And we'll provide those  
17 documents. And then in addition to that, there will be a  
18 spreadsheet that will have the tax labeled out by  
19 ownership and then the associated leases with those tax  
20 so Plaintiff can kind of follow that and see how  
21 everything flows from the one tract and then what's  
22 associated with it.

23 THE COURT: Okay, okay, that's good. All  
24 right. So I don't want to talk about the third-party  
25 subpoena today because I don't have them on the phone,

Roger Birdbear, et al. v. USA

11/2/2016

1 but it sounds like, Mr. Smith, this may have some effect  
2 on what kind of documents you're going to be needing from  
3 the third parties. Is that correct?

4 MR. SMITH: At least we will have a better idea  
5 of exactly what tracts we are looking at for those third  
6 parties.

7 THE COURT: Yeah.

8 MR. SMITH: And certainly the production  
9 records will still be, you know, relevant.

10 THE COURT: Okay. Okay. So, then, what -- I  
11 guess we should -- as long as we're on the phone, I had  
12 asked -- I had directed you to file your amended  
13 complaint by November 7th, but it sounds like you're not  
14 going to be able to do that. So what's a more realistic  
15 date at this point that we can establish?

16 MR. SMITH: Looking at my calendar, probably --  
17 and maybe ask Mr. Greene for some assistance on that.  
18 Maybe perhaps another week or so.

19 THE COURT: Okay.

20 MR. SMITH: The 14th.

21 THE COURT: The 14th.

22 MR. GREENE: Yeah. Your Honor, this is Dustin  
23 Greene. I don't -- I know Plaintiffs don't want to delay  
24 this any more than they have to. I think 5,000 pages of  
25 documents, I think another week should be sufficient if

Roger Birdbear, et al. v. USA

11/2/2016

1 we can -- when we get the protective order agreed to and  
2 get that production this week, we should be fine with a  
3 week extension.

4 THE COURT: Okay.

5 And am I correct, Ms. Schwarz, that the  
6 Government is not going to move to dismiss the second  
7 amended complaint, but we're going to go ahead with  
8 discovery. Is that -- is that still operative, that  
9 agreement?

10 MS. SCHWARZ: Yes, it is operative with the  
11 exception of we reserve the right to the extent that they  
12 do assert claims where we have indicated that there's not  
13 an interest that we could move for judgment on the  
14 pleading as to those claims. We don't anticipate that  
15 that will happen, but we do want to reserve our right to  
16 do so.

17 THE COURT: Okay. Okay. Well, I guess, then,  
18 what would make the most sense at this point is after the  
19 amended complaint is filed, I guess I'll give you a  
20 period of time to come up with some kind of a -- jointly  
21 come up with some kind of a discovery schedule, which is  
22 I think what you originally proposed anyway. What about  
23 two weeks? Is that long enough to come up with a  
24 discovery schedule after the amended complaint is filed?

25 MR. SMITH: That would be fine with us, yes.

Roger Birdbear, et al. v. USA

11/2/2016

1 THE COURT: Ms. Schwarz, that work for you?

2 MS. SCHWARZ: Yes, that is fine.

3 THE COURT: Okay, okay. Then that's what we'll  
4 do. I'll issue an order vacating the November 7th date  
5 and extending it to November 14th, and then giving you  
6 two weeks to come up with a proposed joint plan for  
7 discovery and whatever else you think we need to do.

8 Is there anything else we should be talking  
9 about? Mr. Smith?

10 MR. SMITH: I'm not aware of anything right  
11 now.

12 THE COURT: Okay.

13 Ms. Schwarz?

14 MS. SCHWARZ: Nothing that I can think of at  
15 this moment, but I just would like to flag for the  
16 Court's attention that one of the things we included in  
17 the proposed order that we had submitted to the Court was  
18 our hope that after the Plaintiffs had an opportunity to  
19 review the documents we provide and amend their  
20 complaint, that we could meet to see if there were any of  
21 the points that we could narrow down further.

22 THE COURT: Right. Okay.

23 MS. SCHWARZ: And that may have an impact on  
24 the schedule.

25 THE COURT: Okay. All right. I understand.



Roger Birdbear, et al. v. USA

11/2/2016

1     Okay. Sounds good, then. All right. That's all we need  
2     to discuss, then. I appreciate you getting on the call.  
3     Thank you very much. Bye-bye.

4                     MR. SMITH: Okay.

5                     MS. SCHWARZ: Thank you, Your Honor.

6                     MR. SMITH: Bye.

7                     (Whereupon, at 2:09 p.m., the hearing was  
8     adjourned.)

9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

Roger Birdbear, et al. v. USA

10  
11/2/2016

1 CERTIFICATE OF TRANSCRIBER

2

3 I, George Quade, court-approved reporter,  
4 certify that the foregoing is a correct transcript from  
5 the official electronic sound recording of the  
6 proceedings in the above-titled matter.

7

8

9

10 DATE: 6/8/2017

11 GEORGE QUADE, CERT

12

13

14

15

16

17

18

19

20

21

22

23

24

25